WARMAN INTERNATIONAL LIMITED & ANOR.

v.

BRIAN DWYER & 2 ORS.

HIGH COURT, AUSTRALIA
MASON CJ, BRENNAN, DEANE, DAWSON & GAUDRON JJ
23 MARCH 1995

***COMPANY LAW**: Breach of fiduciary duties by general manager of branch - Formation of new companies to carry out business of former employer - Whether account of profits or recovery of loss flowing from breach of fiduciary duty apropriate remedy - Consequences of breach of fiduciary obligation - Whether person to whom duty is owed should suffer loss or injury.*

***PRACTICE & PROCEDURE**: Remedies for breach of fiduciary duty - Whether account of profits correct remedy - Whether equitable to compel errant fiduciary to account for entire profits over indefinite period of time.*

The 1st appellant's business, *inter alia*, was an agency for the distribution of gearboxes manufactured in Italy by the Bonfiglioli group. The 1st respondent, Dwyer was the general manager of the Queensland branch of Warman. That branch controlled the agency and dealt with Bonfiglioli by reason of its greater sales records of their products and eventually became the only branch directly exploiting the Bonfiglioli agency. Without Warman's knowledge, Dwyer negotiated with Bonfiglioli and in August 1988, Dwyer incorporated two companies i.e. Bonfiglioli Transmission (Aust) Pty. Ltd. ("BTA") and Engineering Transmission Agencies Pty. Ltd. ("ETA"). In BTA, the shareholding was equally divided between Mr. and Mrs. Dwyer and Bonfiglioli. ETA was wholly owned by Mr. and Mrs. Dwyer.

In June 1988, Bonfiglioli had given Warman three (3) months' notice to terminate the agency. Dwyer resigned from Warman on 20 June 1988. BTA entered into a joint venture with Bonfiglioli for the assembly and distribution of Bonfiglioli gearboxes in Australia for a 20 year term. ETA distributed some Bonfiglioli and complimentary non-Bonfiglioli products in conjunction with the join venture.

Warman sued Dwyer, BTA and ETA on 25 October 1988 for relief including an account of profits. The trial Judge found Dwyer to have breached the fiduciary relationship with Warman as he used his knowledge and position as a senior executive officer of Warman to advance his own interests and of ETA and BTA with the connivance of ETA, BTA and Bonfiglioli. As a result, Bonfiglioli terminated Warman's agency earlier and in the absence of Dwyer's conduct in providing an alternative, Bonfiglioli may have retained Warman as agent indefinitely although Bonfiglioli was dissatisfied with Warman's performance as distributor. The trial Judge found that BTA and ETA were equally liable with Dwyer because their controlling minds were fully aware of and joined with breach. The trial Judge allowed an account of profits and attempted to determine the proportion of the defendant's business which flowed to them by reason of the breach of Dwyer's fiduciary obligation, and allowed for the defendant's time, energy, skill and capital expended on the business.

An appeal to the Court of Appeal by the defendant was allowed by the majority on the basis that Warman was only entitled to recover its loss flowing from the breaches of fiduciary duty, not on account of profits.

The plaintiffs appealed to the High Court of Australia on the issue whether Warman was entitled to an account of profits and if so, the basis upon which such an account should be taken. It was common ground that Warman was entitled to be compensated by Dwyer, ETA and BTA for the loss actually sustained by it consequent upon the breaches of fiduciary by Dwyer.

Held:

[1] There are 3 primary remedies consequent upon a breach of a fiduciary obligation namely, taking of accounts, replacement of property unproperly acquired and compensation for the loss sustained.

[2] A fiduciary must account for a profit if it was obtained either (i) when there was a conflict or possible conflict between his fiduciary duty and his personal interest or (ii) by reason of his fiduciary position or by reason of his taking advantage of opportunity or knowledge derived from his fiduciary position. The stringent rule that the fiduciary cannot profit from his trust has two purposes (i) that the fiduciary must account for what has been acquired at the expense of the trust and (ii) to ensure that fiduciaries generally conduct themselves at a level higher than others. It is no defence that the plaintiff was unwilling, unlikely or unable to make the profit for which an account is taken or that the fiduciary acted honestly and reasonably.

[3] An account of profits being an equitable remedy is discretionary and is governed by settled principles. The nature of the property, the relevant powers and obligations of the fiduciary and the relationship between the profit made and the powers and obligations of the fiduciary would be taken into account. In the case of a business, it may be inappropriate and inequitable to compel an errant fiduciary to account for the whole of the profit of his conduct of the business or his exploitation of principal's goodwill over an indefinite period of time. It may be appropriate to allow the fiduciary a proportion of the profits when it has been significantly generated by the skill, efforts, property and resources of the fiduciary, the capital which he has introduced and risks taken. The liability of the fiduciary is not a vehicle for the unjust enrichment of the plaintiff.

[4] The proper basis of an account of profits is to ascertain precisely what it was that was acquired in consequence of the fiduciary's breach and what was lost by the plaintiff. In view of the relationship between Warman and Bonfiglioli the agency lost by Dwyer's breach of fiduciary obligation would otherwise have survived for only a year.

Therefore the appropriate order is for an account of profits of BTA's and ETA's business for a limited initial period of one year. However other advantages knowingly gained by BTA by reason of Dwyer's breach should also be taken into account. In the circumstances, the adequate and appropriate period in respect of which an account of BTA's and ETA's profits and benefit acquired through Dwyer's breach of fiduciary duty should be ordered is a total period of two years and Dwyer, ETA and BTA must account for the entirety of the net profits of the businesses before tax less an appropriate allowance for expenses, skill, expertise, effort and resources contributed by them.

[5] The matter is remitted to the trial Judge for ascertainment of the profits made by the business conducted by BTA and ETA in their first two years of operation together with the amount of interest accruing on the amount due.

[Appeal allowed with costs].

Cases referred to:

Nocton v. Lord Ashburton [1914] AC 932 ***(refd)***
Dart Industries Inc v. Decor Corporation Pty Ltd. [1993] 179 CLR 101 ***(refd)***
Consul Development Pty Ltd. v. DPC Estates Pty. Ltd. [1975] 132 CLR 373 ***(refd)***
Hospital Products Ltd. v. United States Surgical Corporation [1984] 156 CLR 41 ***(refd)***
Chan v. Zacharia [1984] 154 CLR 178 ***(refd)***
Meinhard v. Salmon [1928] 164 NE 545 ***(refd)***
Birtchnell v. Equity Trustees, Executors & Agency Co. Ltd. [1929] 42 CLR 384 ***(refd)***
Furs Ltd. v. Tomkies [1936] 54 CLR 583 ***(refd)***
Industrial Development Consultants Ltd. v. Cooley [1972] 1 WLR 443 ***(refd)***
Canadian Aero Service Ltd. v. O'Malley [1973] 40 DLR (3d) 371 ***(refd)***
Regal (Hastings) Ltd. v. Gulliver [1967] 2 AC 134 ***(refd)***
Philipps v. Boardman [1967] 2 AC 46 ***(refd)***
My Kinda Town Ltd. v. Soll [1982] FSR 147 ***(refd)***
In re Jarvis (decd) [1958] 1 WLR 815 ***(refd)***
Kendall v. Marsters [1860] 2 De G F & J 200 [45 ER 598] ***(refd)***
Clegg v. Edmondson [1857] 8 De G M & G 787 [44 ER 593] ***(cit)***
Aquaculture Corp. [No. 3] [1986] 1 NZIPR 677 ***(cit)***
Colbeam Palmer Ltd. v. Stock Affiliates Pty. Ltd. [1968] 122 CLR 25 ***(cit)***
In re Coomber; Coomber v. Coomber [1911] 1 Ch 723 ***(refd)***
Keech v. Sanford [1726] Sel Cas t King 61 [25 ER 223] ***(refd)***
Griffith v. Owen [1907] 1 Ch 195 ***(refd)***
In re Biss; Biss v. Biss [1903] 2 Ch 40 at 57 ***(refd)***
Sheldon v. Metro-Goldwyn Pictures Corp. [1940] 309 US 390 ***(cit)***
Meehan v. Shaughnessy [1989] 535 NE 2d 1255 ***(cit)***
Brady v. Stapleton [1952] 88 CLR 322 ***(refd)***
O'Sullivan v. Management Agency Ltd. [1985] QB 428 ***(cit)***
Green and Clara Pty. Ltd. v. Bestobell Industries Pty. Ltd. [1982] WAR 1 ***(refd)***
General Tire & Rubber Co. v. Firestone Tyre & Rubber Co. Ltd. [1975] 1 WLR 819 ***(refd)***
Universal Thermosensors Ltd. v. Hibben [1992] 1 WLR 840 ***(refd)***

Other sources referred to:

A Historical Sketch of the Equitable Jurisdiction of the Court of Chancery (1890) Kerly, pp. 148-149
Equity: Doctrines and Remedies, Meagher, Gummow and Lehane, 3rd Edn., (1992) p. 659-660
Unjust Enrichment and the Fiduciary's Duty of Loyalty, Jones (1968) 84 *Law Quarterly Review* 472
Law of Remedies, Dobbs, (1993) 2nd Edn., pp. 435-436
Remedies for Breach of Fiduciary Duty, McCamus, (1991), Special Lectures of the Law Society of Upper Canada 1990 Fiduciary Duties 57, pp. 62-63

For the appellants - Phillips Fox
For the respondents - Halletts

JUDGMENT

Mason CJ, Brennan, Deane, Dawson & Gaudron JJ:

This appeal raises the questions whether an account of profits should be awarded in favour of a successful plaintiff in an action for breach of fiduciary obligation and, if so, the basis upon which such an account should be taken in all the circumstances of the particular case.

The Facts

The first respondent, Mr Dwyer ("Dwyer"), was the general manager of the Queensland branch of the first appellant ("Warman"). Warman was a subsidiary of the second appellant ("Peko-Wallsend"). The learned trial Judge (Derrington J) found that Warman carried on its relevant business as "undisclosed agent" for its holding company, Peko-Wallsend. However,

no point about that has been taken at any stage of the proceedings and the only significance which has been attached to the intrusion of Peko-Wallsend as an "undisclosed" principal has been that the relief granted in the Courts below was in favour of Peko-Wallsend and not Warman. The case has been argued on that basis in this Court and, in the absence of any suggestion to the contrary, it is convenient to ignore the underlying interest of Peko-Wallsend except for the purposes of framing final orders.

Warman's principal business was the manufacture and distribution of slurry pumps, although before 1988 it had been involved in a number of other activities, including an agency for the distribution of gearboxes manufactured in Italy by the Bonfiglioli group together with some related products. It is generally unnecessary to distinguish between the various companies in that group and their management by the Bonfiglioli family, and we shall refer to them collectively as Bonfiglioli or Bonfiglioli interests.

The Queensland branch of Warman sold more Bonfiglioli products in Australia than any other branch. Accordingly, that branch controlled the running of the agency, which included dealing with Bonfiglioli. By 1986, Dwyer was becoming dissatisfied with his employer, partly because it was pursuing restrictive policies in relation to the Bonfiglioli agency. Warman had abandoned its agencies for Bonfiglioli products in all other States in favour of sub-dealerships with independent companies which dealt through the Queensland branch. Thus, the Queensland branch was the only Warman branch directly exploiting the Bonfiglioli agency. Even in the Queensland branch there were reductions in stock levels and staff numbers. In the light of those and other developments, Dwyer was discontented and anxious. As the learned trial Judge found:

> Although he had given it long service and had for a time served in a position associated with its highest level he had then been relegated to the Queensland branch managership. This was compounded by the subsequent heavy reduction in the activity and consequently the staffing of that branch so that his status increasingly became even less than it had been. At that time he correctly foresaw that his salary would be relatively diminished, and no doubt he was anxious even as to the continuity of his future employment. It is not surprising that this was also the source of some discontent to him.

In August 1986 Mr. Carboni, Bonfiglioli's overseas sales manager, visited Australia and said to both Warman's Sydney management and management of the Queensland branch that Bonfiglioli wished to enter into a joint arrangement, preferably with Warman, for the local assembly of its products in Australia. The trial Judge found that the Sydney management (who were Dwyer's superiors) made it very clear that Warman would not be interested in participating in such a venture. It seems that that response provoked Dwyer, together with Mr Jarvis, the former Queensland sales manager for Bonfiglioli products, to sign a letter dated 28 August 1986 addressed to Mr Bonfiglioli. The letter was predominantly the work of Dwyer. It stated that:

> Warman has relatively new top management who are imposing certain restrictions on the operation of Bonfiglioli and other equipment.
>
> We are working at having these restrictions changed... However, if we are unsuccessful, I am considering leaving Warman... It would be my intention to set up our own business which would include and feature Bonfiglioli.

The letter added that Dwyer would be prepared to visit Italy for further discussions, and concluded with the statement that discussions concerning the assembly of units in Australia "would also prove of great interest to us".

During the next year Bonfiglioli explored the possibility of Australian operations with other companies, including Lucas Fluid Power, Gibson Battle & Co. and Muir Engineering. Towards the end of 1987 the proposal of a joint operation with Dwyer was raised again by Bonfiglioli. At around the same time, Mr Lockhart, Warman's Australian sales manager and Dwyer's immediate supervisor, visited Queensland and asked Dwyer whether he would be interested in leaving Warman and purchasing the agencies division for himself. Dwyer declined. Instead, he maintained his own secret negotiations with Bonfiglioli and, to that end, arranged for the two corporate respondents, Bonfiglioli Transmission (Aust.) Pty. Ltd. ("BTA") and Engineering Transmission Agencies Pty. Ltd. ("ETA"), to be incorporated. On 24 February 1988, Dwyer wrote to Mr Bonfiglioli, setting out detailed suggestions concerning share ownership and control of the proposed business, including bringing in as shareholders existing Warman staff in Queensland. He made arrangements with the existing staff in Warman's Queensland branch to work in the new venture, although ultimately they did not take up shares in the new companies.

In April, Dwyer was asked by Lockhart to prepare a review for Warman of the agency division, with a view to assisting Warman's chief executives to decide whether or not to retain it. Shortly afterwards, in May, Dwyer visited Italy without telling his employer, and the trial Judge concluded that while he was there he reached final agreement with Bonfiglioli on the joint enterprise.

In June 1988 Warman's management received written notice dated 26 May from Bonfiglioli terminating the agency agreement. Under the terms of the agreement, either party was entitled to bring the agency to an end on three month's notice. Despite their efforts, representatives of Warman were unable to persuade Bonfiglioli to reverse its decision. At this point, Dwyer revealed that he had accepted a proposal to enter a joint venture with Bonfiglioli. On 20 June he gave notice of resignation and he stopped working for Warman on 30 June. It would seem to be common ground that the agency agreement between Warman and Bonfiglioli came to an end on 26 August.

In August 1988, shares of BTA were issued to Dwyer and his wife (jointly) and to FinBonfiglioli SpA, a member of the Bonfiglioli group, with the result that BTA's shareholding was equally divided between Mr and Mrs Dwyer and Bonfiglioli. ETA remained wholly owned by Mr and Mrs Dwyer (separately) and distributed some Bonfiglioli products and the range of complementary non-Bonfiglioli products in conjunction with the joint venture. Warman had abandoned the non-Bonfiglioli products because their turnover depended substantially on their complementary status to Bonfiglioli products. On 12 September, FinBonfiglioli SpA and BTA executed a joint venture agreement with Dwyer and Mrs Dwyer, which provided for the assembly and distribution of Bonfiglioli gearboxes in Australia for a 20 year term. The range of Bonfiglioli stock was substantially increased and the local assembly venture was set up. BTA took over the agency business in Australia which included the assembly and the distribution of gearboxes. The businesses have been successful, with net profits (before tax) of some $1.6 million over the four years preceding the trial.

The Decision of The Trial Judge

Warman commenced proceedings against Dwyer and the corporate respondents on 25 October 1988, seeking relief including an account of profits. The trial Judge found that Dwyer's conduct amounted to a clear breach of the fiduciary relationship between himself and Warman. With the connivance of BTA and ETA and Bonfiglioli, Dwyer has used his knowledge and his position as a senior executive officer of Warman to advance his own interests and those

of the other defendants to Warman's disadvantage, by reducing Bonfiglioli's confidence in Warman and offering himself and the agency staff as an attractive competitor for Bonfiglioli's business.

The result was that Bonfiglioli probably terminated its agency with Warman earlier than it otherwise would have done. In this respect, it is important to note that the trial Judge found that "in the absence of [Dwyer's] conduct in providing an alternative, Bonfiglioli may well have retained Warman as its agent indefinitely". Indeed, his Honour stated that, if Dwyer had defended Warman, instead of denigrating it, "the agency may well have been preserved to it". At the same time, his Honour acknowledged that, while Warman was content to retain the agency, "it probably would not have been willing to enter into any arrangement such as presently exists for holding a substantially larger amount of stock or for a joint venture in the assembly of the machinery". This was a matter of considerable importance to Bonfiglioli which was "independently active in pursuit of seeking such an arrangement". Bonfiglioli was somewhat dissatisfied with Warman's performance as its distributor.

Without Bonfiglioli products, the other products were not worth retaining, so that the entire agency division was lost. His Honour also found that BTA and ETA were equally liable with Dwyer, because their controlling minds were fully aware of and joined in the breach.

The trial Judge stated that it was open to the plaintiffs to recover "equitable damages" for "the loss of Warman's chance of retaining the agencies business". In assessing such damages it would be necessary to take into account, *inter alia*, the considerations that Bonfiglioli seriously intended to find another agent if Warman remained uninterested in a local assembly joint venture and that, although Bonfiglioli would probably eventually have terminated the agency, it would probably not have done so as quickly as it did but for Dwyer's conduct. His Honour concluded that the appropriate figure would have been $325,000 which was the "figure (which) would have been reached by assessing the value of the business at that time at one year's potential profits before tax". Presumably, the reference to "that time" was a reference to the time when the Bonfiglioli agency was lost. However, the plaintiffs sought a declaration that the goodwill of the defendants' business was held in trust for Warman, together with an account of profits to date. His Honour refused to make a declaration of trust of the goodwill but acceded to the claim for an account of profits. In determining the appropriate basis for such an account, he attempted to determine the proportion of the defendants' business which flowed to them by reason of the breach of Dwyer's fiduciary obligation. His Honour also provided for the payment of an additional amount on account of the "present value" of that proportion of the goodwill of the defendants' business.

Derrington J considered that the case for the making of allowances to the defendants for the time, energy, skill and capital they brought into the business was quite strong, because of a number of factors. Some profits were derived from the local assembly venture, although it was difficult to quantify precisely the extent to which this was so. The trial Judge also made allowances for increased sales due to the combination of the larger stock holding and the flexibility produced by the assembly process resulting from a large capital injection for stock and equipment; Dwyer's skill, energy and effort; and the selective acquisition of only the most profitable agencies formerly held by Warman. Consequently, the trial Judge chose to make an allowance to the defendants of one-half of the goodwill of the business and its after-tax net profits. The trial Judge said that the value of the respondents' businesses "should be estimated upon a capitalisation rate of one applied to the combined net profit after tax of the whole business". This had the effect of giving to each business a "present

value" equal to its after-tax profit for the 1991/1992 year of income. Those values were $148,370 for BTA, and $45,092 for ETA. The plaintiffs' half-share of the sum of those values is $96,731. His Honour calculated the total net profits of BTA for the preceding four years at $1,086,257 and of ETA at $515,923. Half of that sum is $801,090.

In estimating the goodwill of each business by reference to one year's profits, his Honour appears to have taken into account "Warman's various chances of abandoning or retaining or losing (the business)" and Bonfiglioli's endeavours for some time to make arrangements for assembly thereby indicating "its serious intention to find some such alternative if Warman remained uninterested". His Honour made only a nominal allowance for interest on the profits in earlier years, namely, $10,000, on the basis that most, if not all, of the profits were returned to the businesses which, in turn, contributed to their subsequent profitability.

The trial Judge declined to make a declaration that the defendants held part of their business on trust for Warman, on the basis that it was undesirable to thrust the parties into a continuing business relationship when it was clear that there was no confidence or comity between them. Instead, his Honour ordered that the respondents pay to Warman one-half of the present value of the goodwill of the businesses. It is common ground that, owing to an arithmetical error, the trial Judge determined that the value of the half-share was $146,731 instead of $96,731. This latter amount was charged against the assets of both BTA and ETA. Altogether, the trial Judge awarded judgment against Dwyer, BTA and ETA of $957,821, being the sum of $801,090, $10,000 and $146,731.

The Decision of The Court of Appeal

All members of the Court of Appeal upheld the conclusion of the trial Judge that Dwyer had acted in breach of his fiduciary duty, and that holding was not challenged in this Court. However, the majority (Macrossan CJ and Pincus JA) allowed the appeal, on the basis that, instead of taking an account of profits, Warman was only entitled to recover its loss flowing from the breaches of fiduciary duty. McPherson J.A. dissented, and would have dismissed the appeal, apart from correcting the arithmetical error in calculating the value of the goodwill.

The majority mentioned the following considerations which were relevant to their conclusion that an account of profits should not have been ordered. First, Dwyer did not himself make any profits as a direct result of trading in Bonfiglioli products; the profits were made by BTA and ETA. Nevertheless, the trial Judge held each defendant liable to account for all of the profits made by the others. While that might have been correct in respect of ETA, of which Dwyer constituted the controlling mind, it could hardly be the case in respect of BTA, in which Mr and Mrs Dwyer held only a half-interest. Macrossan CJ and Pincus JA stated that they had been unable to find any authority for the view that if a fiduciary, in breach of duty, takes part in the formation of a company which earns profits which would have gone to the plaintiff but for the breach, then the fiduciary is liable to account as if he had himself earned the profits. Secondly, the majority considered that it was unclear on what basis Dwyer should have been held liable to pay the one-half of the value of the goodwill of BTA and ETA, for he did not himself personally receive that benefit. The majority were also critical of the trial Judge's calculation of the value of the goodwill; their Honours said that ordinarily a buyer would be expected to pay a multiple of the figure awarded by the trial Judge. The award should have included an estimate of the present value of the expected future profits. Thirdly, they said that it was difficult to see that there was any real foundation for the view that one-half of the goodwill, rather than some other fraction, should be attributed to the

business which Warman had lost. Fourthly, BTA and ETA each carried on businesses of a very different character from the Bonfiglioli agency Warman had formerly enjoyed. Fifthly, it was said that it was not BTA and ETA which participated in Dwyer's breach of duty, but rather Bonfiglioli, the Italian company, while BTA and ETA had merely carried on business knowing of Dwyer's breach. Sixthly, the majority considered that the cases manifested a reluctance to let the wronged party reap a great benefit from the wrong done to it, and that in all cases the fiduciary's liability must be imposed flexibly, bearing in mind all the facts of the case. Their Honours held that "only by assessing the profits gained on the assumption that they ceased at trial and attaching a remarkably low value to the goodwill was the learned primary Judge able to arrive at a figure which might not seem to be beyond the bounds of reason". This result was not defensible. Accordingly, their Honours ordered that the matter should be remitted so as to allow judgment to be given against the defendants for the loss suffered by the plaintiffs consequent upon the breaches of fiduciary duty.

The Appeal to This Court

The argument on the appeal to this Court has been confined to the questions mentioned at the commencement of this judgment, namely, whether Warman was entitled to an account of profits and, if so, the basis upon which such an account should be taken. Neither in this Court nor in the Court of Appeal has Warman sought to attack the trial Judge's conclusion that it was inappropriate to make a declaration of trust of the goodwill of the business of either BTA or ETA. For their part, Dwyer, BTA and ETA have not argued either in this Court or in the Court of Appeal that any amount awarded by way of account of profits or equitable compensation should not be made against all three of them jointly. Nor has Dwyer, BTA or ETA sought to argue that the order for equitable compensation made by the Court of Appeal was too generous to Warman. That being so, it has been common ground that Warman was entitled to be compensated by Dwyer, BTA and ETA for the loss actually sustained by it consequent upon the breaches of fiduciary duty by Dwyer.

The Consequences of a Breach of a Fiduciary Obligation

There is no doubt that, before leaving the employment of Warman, Dwyer had made at least a preliminary agreement to set up a joint venture with Bonfiglioli, thus supplanting Warman. Instead of attempting to enhance the relationship between Bonfiglioli and his employer, Dwyer actively sought to reduce Bonfiglioli's confidence in Warman. So much is plain from the correspondence and from the fact that Dwyer caused BTA and ETA to be incorporated months before he resigned in 1988. It is also plain that Dwyer made arrangements with the other staff of Warman's Queensland branch to the effect that they would leave Warman and become the staff of the new distributing agent if and when his plans came to fruition. Hence, this is a clear case of a fiduciary breaching his obligations.

In *Nocton v. Lord Ashburton* [1914] AC 932 at 956-957 Viscount Haldane LC described the three primary remedies consequent upon a breach of a fiduciary obligation between a solicitor and client:

> Courts of Equity had jurisdiction to direct accounts to be taken, and in proper cases to order the solicitor to replace property improperly acquired from the client, or to make compensation if he had lost it by acting in breach of a duty which arose out of his confidential relationship to the man who had trusted him.

Although the Lord Chancellor was addressing the fiduciary relationship which arises between a solicitor and client, his words are of general application. In the present appeal, all three of those remedies are relevant, but, as has been indicated, the primary focus is the remedy of account.

The remedy is ancient and notoriously difficult in practice see Kerly, *A Historical Sketch of the Equitable Jurisdiction of the Court of Chancery*, (1890) at 148-149; Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 3rd Edn., (1992) at 659-660. *Dart Industries Inc. v. Decor Corporation Pty. Ltd.* [1993] 179 CLR 101 illustrates some of the attendant difficulties (and it gives rise to a liability, even in a case of a fiduciary, which is personal see *Consul Development Pty. Ltd. v. DPC Estates Pty. Ltd.* [1975] 132 CLR 373 at 395). In the context of patent infringement, the purpose of ordering an account is not to punish the defendant, but to prevent the defendant's unjust enrichment (*Dart Industries* [1993] 179 CLR at 111). But the liability of a fiduciary to account differs from that of an infringer in an intellectual property case. It has been suggested that the liability of the fiduciary to account for a profit made in breach of the fiduciary duty should be determined by reference to the concept of unjust enrichment, namely, whether the profit is made at the expense of the person to whom the fiduciary duty is owed, and to the honesty and *bona fides* of the fiduciary. (*Hospital Products Ltd. v. United States Surgical Corporation* [1984] 156 CLR 41 at 107 per Mason J; *Chan v. Zacharia* [1984] 154 CLR 178 at 199 per Deane J). But the authorities in Australia and England deny that the liability of a fiduciary to account depends upon detriment to the plaintiff or the dishonesty and lack of *bona fides* of the fiduciary. Gibbs J in *Consul Development Pty. Ltd. v. DPC Estates Pty. Ltd.* [1975] 132 CLR at 394 stated:

> Where the rule applies, the liability of the person in a fiduciary position does not depend on the fact that the person to whom the duty is owed has suffered injury or loss.

A fiduciary must account for a profit or benefit if it was obtained either (1) when there was a conflict or possible conflict between his fiduciary duty and his personal interest, or (2) by reason of his fiduciary position or by reason of his taking advantage of opportunity or knowledge derived from his fiduciary position (see Jones, "*Unjust Enrichment and the Fiduciary's Duty of Loyalty*", (1968) 84 *Law Quarterly Review* 472. In the United States, the accountability of a fiduciary is influenced by the doctrine of unjust enrichment). The stringent rule that the fiduciary cannot profit from his trust is said to have two purposes: (1) that the fiduciary must account for what has been acquired at the expense of the trust, and (2) to ensure that fiduciaries generally conduct themselves "at a level higher than that trodden by the crowd" (*Meinhard v. Salmon* [1928] 164 NE 545 at 546 per Cardozo CJ). The objectives which the rule seeks to achieve are to preclude the fiduciary from being swayed by considerations of personal interest and from accordingly misusing the fiduciary position for personal advantage (*Chan v. Zacharia* [1984] 154 CLR at 198-199).

Thus, it is no defence that the plaintiff was unwilling, unlikely or unable to make the profits for which an account is taken or that the fiduciary acted honestly and reasonably (*Birtchnell v. Equity Trustees, Executors & Agency Co. Ltd.* [1929] 42 CLR 384 at 409; *Furs Ltd. v. Tomkies* [1936] 54 CLR 583 at 592; *Consul Development* [1975] 132 CLR at 394; *Industrial Development Consultants Ltd. v. Cooley* [1972] 1 WLR 443; *Canadian Aero Service Ltd. v. O'Malley* [1973] 40 DLR (3d) 371). So, in *Regal (Hastings) Ltd. v. Gulliver* [1967] 2 AC 134, although the directors acted in good faith and in the interests of the company of which they were directors in taking up shares in a subsidiary which the company could not afford to take up, they were held accountable for the profit made on the sale of the shares. And, in

Phipps v. Boardman [1967] 2 AC 46, the solicitor was held accountable for the profit he made, notwithstanding that he acted *bona fide* and in the interests of the trust and that the opportunity would not have been availed of but for his skill and knowledge.

The assessment of the profit will often be extremely difficult in practice; accordingly it has been said that "[w]hat will be required on the inquiry ... will not be mathematical exactness but only a reasonable approximation" (*My Kinda Town Ltd. v. Soll* [1982] FSR 147 at 159 per Slade J). What is necessary however is to determine as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty (*Hospital Products* [1984] 156 CLR at 110).

In *Hospital Products Ltd. v. United States Surgical Corporation* (*ibid*), Mason J referred to the two approaches to the problem of determining the fiduciary's liability mentioned by Upjohn J in *In re Jarvis (decd)* [1958] 1 WLR 815 at 820:

> One approach, more favourable to the fiduciary, is that he should be held liable to account as constructive trustee not of the entire business but of the particular benefits which flowed to him in breach of his duty. Another approach, less favourable to the fiduciary, is that he should be held accountable for the entire business and its profits, due allowance being made for the time, energy, skill and financial contribution that he has expended or made. ... In each case the form of inquiry to be directed is that which will reflect as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty.

This distinction was raised in argument in this Court and in the Courts below, and it will be necessary to return to it.

Ordinarily a fiduciary will be ordered to render an account of the profits made within the scope and ambit of his duty (*Phipps v. Boardman* [1967] 2 AC at 127 per Lord Upjohn). Of course, if the loss suffered by the plaintiff exceeds the profits made by the fiduciary, the plaintiff may elect to have a compensatory remedy against the fiduciary. That election will bind the plaintiff (*Kendall v. Marsters* [1860] 2 De G F & J 200 [45 ER 598]).

Although an account of profits, like other equitable remedies, is said to be discretionary, it is granted or withheld according to settled principles. It will be defeated by equitable defences such as estoppel, laches, acquiescence and delay. And, notwithstanding what was decided in *Regal (Hastings) Ltd. v. Gulliver* and *Phipps v. Boardman*, it may be that (*Chan v. Zacharia* [1984] 154 CLR at 204-205 per Deane J):

> the liability to account for a personal benefit or gain obtained or received by use or by reason of fiduciary position, opportunity or knowledge will not arise in circumstances where it would be unconscientious to assert it or in which, for example, there is no possible conflict between personal interest and fiduciary duty and it is plainly in the interests of the person to whom the fiduciary duty is owed that the fiduciary obtain for himself rights or benefits.

The conduct of the plaintiff may be such as to make it inequitable to order an account. Thus a plaintiff may not stand by and permit the defendant to make profits and then claim entitlement to those profits (*In re Jarvis (decd)* [1958] 1 WLR at 820-821 citing *Clegg v. Edmondson* [1857] 8 De G M & G 787 [44 ER 593]; *Aquaculture Corp.* [No. 3] [1986] 1 NZIPR 677 at 690; see also *Colbeam Palmer Ltd. v. Stock Affiliates Pty. Ltd.* [1968] 122 CLR 25 at 33).

It is necessary to keep steadily in mind the cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts. As Fletcher Moulton LJ observed in *In re Coomber; Coomber v. Coomber* [1911] 1 Ch 723 at 728-729 (see also *Chan v. Zacharia* [1984] 154 CLR at 195, 205):

> Fiduciary relations are of many different types ... and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case ... than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them.

But the basic principle remains that a principal who so elects is entitled to an account of profits, subject to considerations of the kind already mentioned. In the present case, not only was Dwyer actively dishonest, but also Warman commenced proceedings in the Supreme Court of Queensland in October 1988, shortly after Dwyer's departure, so that Dwyer had an opportunity to consider his position and take appropriate action such as the proper purchase of the goodwill of the agency business from Warman. And when the fiduciary is actively dishonest and obtains an identifiable profit from that dishonesty, it is more difficult still to conceive of circumstances in which no account at all should be ordered.

The outcome in cases of this kind will depend upon a number of factors. They include the nature of the property, the relevant powers and obligations of the fiduciary and the relationship between the profit made and the powers and obligations of the fiduciary. Thus, according to the rule in *Keech v. Sanford* [1726] Sel Cas t King 61 [25 ER 223], a trustee of a tenancy who obtains for himself the renewal of a lease holds the new lease as a constructive trustee, even though the landlord is unwilling to grant it to the trust. But the rule "depends partly on the nature of leasehold property" and partly on the position which the trustee occupies (see *Griffith v. Owen* [1907] 1 Ch 195 at 203-204; *In re Biss; Biss v. Biss* [1903] 2 Ch 40 at 57; *Chan v. Zacharia* [1984] 154 CLR at 181-182, 201). A similar approach will be adopted in a case in which a fiduciary acquires for himself a specific asset which falls within the scope and ambit of his fiduciary responsibilities, even if the asset is acquired by means of the skill and expertise of the fiduciary and would not otherwise have been available to the person to whom the fiduciary duty is owed.

But a distinction should be drawn between cases in which a specific asset is acquired and cases in which a business is acquired and operated. Such a distinction was drawn by Upjohn J in *In re Jarvis (decd)* [1958] 1 WLR 815 in the context of considering a defence of laches, acquiescence and delay. However, in our view, the distinction is also relevant in the context of the fiduciary's liability to account for profits. In *In re Jarvis (decd)* Upjohn J said (*ibid*. at 821):

> In dealing with [a] business, the principles applying are quite different from those in the case of a specific asset, such as a renewed lease.

His Lordship then went on to cite the observations of Knight Bruce LJ in *Clegg v. Edmondson* [1857] 8 De G M & G 787 at 814 [44 ER 593 at 604]:

> A mine which a man works is in the nature of a trade carried on by him. It requires his time, care, attention and skill to be bestowed on it, besides the possible expenditure and risk of capital, nor can any degree of science, foresight and examination afford a sure guarantee against sudden losses, disappointments and reverses. In such cases a man having an adverse claim in equity on the ground of constructive trust should pursue it promptly, and not by empty words merely. He should shew himself in good time willing to participate in possible loss as well as profit, not play a game in which he alone risks nothing.

In the case of a business it may well be inappropriate and inequitable to compel the errant fiduciary to account for the whole of the profit of his conduct of the business or his exploitation of the principal's goodwill over an indefinite period of time. In such a case, it may be appropriate to allow the fiduciary a proportion of the profits, depending upon the particular circumstances. That may well be the case when it appears that a significant proportion of an increase in profits has been generated by the skill, efforts, property and resources of the fiduciary, the capital which he has introduced and the risks he has taken, so long as they are not risks to which the principal's property has been exposed. Then it may be said that the relevant proportion of the increased profits is not the product or consequence of the plaintiff's property but the product of the fiduciary's skill, efforts, property and resources. This is not to say that the liability of a fiduciary to account should be governed by the doctrine of unjust enrichment, though that doctrine may well have a useful part to play; it is simply to say that the stringent rule requiring a fiduciary to account for profits can be carried to extremes and that in cases outside the realm of specific assets, the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff.

It is for the defendant to establish that it is inequitable to order an account of the entire profits. If the defendant does not establish that that would be so, then the defendant must bear the consequences of mingling the profits attributable to the defendant's breach of fiduciary duty and the profits attributable to those earned by the defendant's efforts and investment (Dobbs, *Law of Remedies*, 2nd Edn., (1993) at 435-436; see also *Sheldon v. Metro-Goldwyn Pictures Corp.* [1940] 309 US 390 at 408; *Meehan v. Shaughnessy* [1989] 535 NE 2d 1255), in the same way that a trustee of a mixed fund bears the onus of distinguishing what is his own (*Hospital Products* [1984] 156 CLR at 109-110; *Brady v. Stapleton* [1952] 88 CLR 322 at 336).

Whether it is appropriate to allow an errant fiduciary a proportion of profits or to make an allowance in respect of skill, expertise and other expenses is a matter of judgment which will depend on the facts of the given case see McCamus, "*Remedies for Breach of Fiduciary Duty*", (1991) *Special Lectures of the Law Society of Upper Canada 1990 Fiduciary Duties* 57 at 62-63; see also *O'Sullivan v. Management Agency Ltd.* [1985] QB 428). However, as a general rule, in conformity with the principle that a fiduciary must not profit from a breach of fiduciary duty, a Court will not apportion profits in the absence of an antecedent arrangement for profit-sharing but will make allowance for skill, expertise and other expenses.

The Court of Appeal's Refusal to Order An Account of Profits

In the present case, Dwyer, BTA and ETA have, in different capacities, all knowingly profited from Dwyer's breach of fiduciary duty. There is no acceptable basis for depriving Warman, as the majority in the Court of Appeal did, of any right to elect to have an account of profits and thereby allowing Dwyer, BTA and ETA to retain any benefit flowing from Dwyer's breach of fiduciary obligation over and above the amount which represents equitable compensation for the loss actually sustained by Warman. As already explained, it is firmly established that the liability of a fiduciary to account for a profit or gain made in breach of fiduciary duty does not depend upon the person to whom that obligation is owed suffering a loss or injury (*Birtchnell v. Equity Trustees* [1929] 42 CLR at 409-409 per Dixon J; *Consul Development* [1975] 132 CLR at 394, 395 per Gibbs J); and it is ordinarily immaterial to the fiduciary's liability to account that the person to whom the fiduciary obligation is owed could not have earned the profit or gain *Birtchnell v. Equity Trustees* [1929] 42 CLR at 408-409; *Furs Ltd. v. Tomkies*

[1936] 54 CLR at 592; *Consul Development* [1975] 132 CLR at 394, 395; *Industrial Development v. Cooley* [1972] 1 WLR 443; *Canadian Aero Service Ltd. v. O'Malley* [1973] 40 DLR (3d) 371; *Green and Clara Pty. Ltd. v. Bestobell Industries Pty. Ltd.* [1982] WAR 1 at 4, 20). The Courts have always insisted on compliance by fiduciaries with strict and rigorous standards with a view to ensuring that they do not expose themselves to a conflict of interest and duty. The point is that a fiduciary is not entitled to make a profit out of, or by reason of, a fiduciary position without the knowledge and assent of the person to whom the fiduciary duty is owed (*Phipps v. Boardman* [1967] 2 AC at 105; *Consul Development* [1975] 132 CLR at 393 per Gibbs J). It follows that, if a profit has been made in breach of fiduciary duty, the person to whom the duty is owed is entitled to an account subject to the considerations discussed above and to the making of any appropriate allowance.

The trial Judge awarded an account of profits made by BTA and ETA during the four year period preceding the hearing, but permitted the respondents to retain an allowance of 50 per cent of those profits. The Court of Appeal by majority overturned the trial Judge's decision, stating:

> The cheat may have to pay nothing, or a great sum, depending on whether or not he was a fiduciary. The defendant who in a marginal case is held to have breached a fiduciary duty may think it odd that his mistake - for it may be no more than that - is more expensive than simple fraud would have been.

This passage overlooks the strict and rigorous standards which the Courts have applied to fiduciaries and the critical and essentially undisputed fact that Dwyer was a fiduciary in breach of his obligations to Warman. As it happened, Dwyer was almost certainly also in breach of a confidentiality agreement between himself and Warman, which *inter alia* imposed on him express obligations to refrain from using confidential information in a manner that might cause loss to Warman. For his contractual breaches, the usual compensatory remedies would lie. But, because Dwyer was also a fiduciary, and therefore in a position of trust, the consequences of his action are, rightly, more severe. Any other result misapprehends the fiduciary relationship and the consequences in equity of a breach of fiduciary obligations.

Prima facie, one would have expected that the focus of Warman's attack would have been directed to Dwyer's shareholdings in BTA and ETA. Clearly enough, it was arguable that any amount by which the value of Dwyer's shares in those two companies exceeded their cost to him represented a capital profit which Dwyer had derived by his breach of fiduciary duty and for which he should be called to account either by the imposition of a constructive trust of the shares (subject to payment by Warman of subscription moneys and other appropriate expenses or allowances) or by the payment by him to Warman of an amount of money equal to the excess of the value of his shares. While the statement of claim sought a declaration that Dwyer held his shares in the two companies in trust, the trial Judge's judgment contains nothing to suggest that any such claim was pursued at the hearing. One can conceive of a variety of possible reasons for that, including the difficulty in establishing that the shares in BTA or ETA were worth more than Dwyer had paid for them and the considerations which the trial Judge took into account in refusing to make a declaration of trust of good will and which would militate against making an order which introduced Warman as an equal shareholder (with Bonfiglioli) in BTA which was essentially a joint venture company. In addition, the position was complicated by the fact that Mrs Dwyer, who was not a party to the proceedings, was a joint holder with Dwyer of the "Dwyer shares" in BTA and was the holder of one of the two issued shares in ETA. Be that as it may, neither in this Court nor, apparently, in the Court of Appeal has Warman sought to argue that the

trial Judge fell into error in failing to grant any relief in relation to Dwyer's shareholding in either BTA or ETA. To the contrary, its claim in this Court for an account has focused exclusively upon the businesses of BTA and ETA and the profits made by those companies.

The learned trial Judge found that "those who constituted the minds of" BTA and ETA "were fully aware of and joined in" Dwyer's breach of fiduciary obligation. That finding was justified by the evidence. The two companies had been incorporated for the purpose of reaping the benefits of Dwyer's breach of fiduciary duty. In due course, they knowingly sought and obtained those benefits by beginning and carrying on the distribution business which had been lost by Warman or (in the case of the agency for complementary non-Bonfiglioli products) rendered non-viable when Warman's Bonfiglioli agency was prematurely terminated. In these circumstances, the conclusion was clearly warranted that the two companies had knowingly and actively participated in Dwyer's breach of fiduciary obligation to the extent necessary to bring them within the principle identified by Gibbs J in *Consul Development* [1975] 132 CLR at 397:

> a person who knowingly participates in a breach of fiduciary duty is liable to account to the person to whom the duty was owed for any benefit he has received as a result of such participation.

Indeed, no submission to the contrary was advanced in the course of argument in this Court.

The Basis For An Account of Profits

In determining the proper basis for an account of profits, it is of first importance in this, as in other cases, to ascertain precisely what it was that was acquired in consequence of the fiduciary's breach of duty. And, in some situations, it may also be relevant to ascertain what was lost by the plaintiff. The starting point in the present case is that Warman's Bonfiglioli agency business rested on the contract by which Bonfiglioli appointed Warman its exclusive Australian distributor of gearboxes and other components. The contract was terminable by Bonfiglioli on three months' notice to Warman. The local goodwill associated with the Bonfiglioli products distributed by Warman - the local product goodwill - was the property of Bonfiglioli just as the local product goodwill in Australia in *Hospital Products* [1984] 156 CLR at 100-101 was that of the United States principal. That, of course, is not to deny the existence in Warman of a goodwill associated with its distribution of Bonfiglioli products. It does not appear that any distinction was drawn at trial between the goodwill of Bonfiglioli and that of Warman or that any attempt was made to identify and value each of them.

But, in light of the fact that the contract was terminable on three months' notice and that Bonfiglioli was dissatisfied with the Australian arrangements and wished to engage in local assembly, it is reasonable to conclude that, in all likelihood, the Warman distributorship would not have endured for much longer in any event. That seems to have been the view of the trial Judge from the findings he made. No doubt Dwyer's disloyal machinations played a part in Bonfiglioli's disenchantment with Warman. At the same time, it seems fairly clear that the relationship between Warman and Bonfiglioli was not mutually enthusiastic and that the association was destined to end.

Precisely when it would have ended were it not for Dwyer's breach of fiduciary obligation is unclear. Earlier in these reasons we set out the findings of the trial Judge as they bear on that issue. It seems to us that his Honour, when his findings are properly understood, valued the Bonfiglioli distributorship business in the hands of Warman by reference to one year's

profits on the basis that, taking account of the various contingencies including the remote possibility that the agency might have continued indefinitely, the distributorship, in all likelihood would have remained on foot for a further year but no more. That view about what would have happened in the absence of Dwyer's breach of fiduciary obligation was certainly open to his Honour. It should be accepted as correct.

That means that the immediate detriment sustained by Warman by reason of Dwyer's breach of fiduciary obligation, was the loss of an agency (i.e., the Bonfiglioli agency) which, on the probabilities, would otherwise have survived for, but only for, a further year. The advantage gained by BTA (and, indirectly, by Dwyer as a shareholder in BTA) from Dwyer's breach of fiduciary duty was not, however, confined to profits or other financial benefits directly attributable to the carrying on of the Bonfiglioli agency during the year following the termination of Warman's distribution agreement. Dwyer's breach of fiduciary duty included, to the knowledge of BTA, the persuasion of employees of Warman to leave Warman and join BTA. It was on the basis of the acquisition of the Bonfiglioli agency that the entitlement to assemble the Bonfiglioli products locally was acquired and exploited by BTA. In so far as ETA is concerned, the associated distributorship business of that company was likewise established upon the basis of BTA's acquisition of the Bonfiglioli agency.

If all of the issued shares in BTA were owned by Dwyer, it might be difficult to reach any conclusion other than the whole of BTA's assembly and distributorship business had been built upon Dwyer's breach of fiduciary duty. On balance, however, it seems to us that the fact that BTA was half owned by the Bonfiglioli interests precludes that conclusion in the circumstances of this case. As has been mentioned, the local goodwill associated with the Bonfiglioli products had always remained the property of Bonfiglioli. Warman was entitled to exploit that local goodwill only during the period of its distributorship. Warman's agency had not extended at all to the local assembly of the Bonfiglioli products. Realistically, the main basis of BTA's business was what Bonfiglioli had always retained and been entitled to exploit, namely, the local goodwill of the Bonfiglioli products after the termination of Warman's agency and the right to assemble those products locally. Nonetheless, the fact remains that BTA knowingly benefited from Dwyer's breach of fiduciary duty in the manner and to the extent which has been indicated above. In these circumstances, the appropriate approach is to see BTA's business as built, to the extent of that benefit, upon Dwyer's breach of fiduciary duty but otherwise upon Bonfiglioli's ownership of local goodwill and local assembly rights. Similarly, ETA's business, being complementary to BTA's business, can properly be seen as indirectly and correspondingly based upon those foundations.

Once that is accepted, as in our opinion it must be, it seems to us that the appropriate order for an account is an order which is restricted to requiring an account of the profits of BTA's and ETA's business for a limited initial period. The critical question is what is the appropriate duration of that limited initial period. The starting point must be the finding that, were it not for Dwyer's breach of fiduciary duty, Warman's Bonfiglioli distributorship would probably have continued for, but only for, a further period of one year. Clearly, any order against BTA for an account of profits must encompass an account on an appropriate basis for any profits earned by it from the exploitation of the Bonfiglioli agency during that period. Such an order must, however, take account of other advantages knowingly gained by BTA by reason of Dwyer's breach of fiduciary obligation. As has been said, the entitlement to assemble the Bonfiglioli products locally was based upon the Bonfiglioli agency. More important, the acquisition of the service of former Warman employees through Dwyer's breach of fiduciary obligation enabled BTA effectively to take over the limited goodwill of Warman's

agency business (as distinct from the local goodwill of the Bonfiglioli products) and to derive benefits from the experience, contacts and know-how of those employees. Those benefits would, at least to some extent, have endured beyond the initial one year period.

As has been indicated, the basis upon which an account of profits should be taken is often extremely difficult to determine in practice. It is so in the present case. Indeed, what is required in the present case is essentially what Lord Wilberforce described as a "judicial estimation of the available indications" (*General Tire & Rubber Co. v. Firestone Tyre & Rubber Co. Ltd.* [1975] 1 WLR 819 at 826). However, even after making full allowance for the limits of judicial discretion, it appears to us that the learned trial Judge's order requiring accounts of four years' profits plus payment of a purchase price for goodwill at the end of that period went beyond what is fair and equitable in the circumstances. It seems to us that, in all the circumstances and in the context of what is said in the following two paragraphs, the adequate and appropriate period in respect of which an account of BTA's profits should be ordered is a total period of two years. An account of profits in respect of that period would, in our view, clearly cover the whole of the benefits acquired by BTA through Dwyer's breach of fiduciary duty. It follows from what has been said above that the period of two years is also the appropriate period in respect of which an account of profit should be ordered against ETA.

In deciding which of the two approaches discussed by Upjohn J in *In re Jarvis* (decd) should be applied, it is relevant to ascertain the relationship of the distributorship business as it was carried on by Warman and as it was later carried on by BTA and ETA. The local assembly aspect of the business of Bonfiglioli was new but it was relatively small in comparison with the whole, employing only one man full-time and a couple of part-time helpers. There were differences in the complementary agencies and there was a substantial increase in the level of stock maintained by the respondents compared with the level maintained by Warman. Despite these differences, the distributorship business conducted by Warman - importation of Bonfiglioli components - became the core business of BTA. The question whether a particular business acquired by a defendant as a result of misuse of his position is sufficiently the same as that formerly conducted by the plaintiff is essentially a question of fact (see *Universal Thermosensors Ltd. v. Hibben* [1992] 1 WLR 840 at 850-851). In the present case, Dwyer was asked in cross-examination:

> Would it be fair to say that the business operated by BTA and ETA has been carved out of the business that was operated by the Queensland branch of the engineering agency division of Warman?

He replied:

> Generally, yes.

The answer accords with the evidence as a whole.

In these circumstances, the respondents should be ordered to account on the basis of the approach less favourable to them; they must account for the entirety of the net profits of the businesses before tax less an appropriate allowance for expenses, skill, expertise, effort and resources contributed by them. There is insufficient material before this Court to determine what that allowance should be. Nor is it possible to adopt the trial Judge's approach that the appropriate order is for an account of one-half of the profits of the relevant years since that approach was based, to some extent, on his Honour's conclusion that the account should be only in respect of "the proportion of the defendants' business which flowed to them by reason of the breach".

Denial of Natural Justice

The respondents contended that the trial Judge erred in taking an account without giving the parties an opportunity to call evidence and make submissions when the evidence before him was insufficient for that purpose. The respondents submitted that, in these circumstances, the taking of an account constituted a denial of natural justice. McPherson JA, in his dissenting reasons for judgment in the Court of Appeal, recorded that Warman while acknowledging that the trial Judge was not asked to take the account himself, denied that the respondents were prejudiced in any way. McPherson JA pointed out that evidence relevant to damages and profits was presented at the trial by all parties with a view to the trial Judge determining what relief would be appropriate, that is, whether damages should be awarded or profits recouped. While our conclusion that the orders made by the trial Judge should not be reinstated in any event makes the question of academic interest only, we would express our agreement with McPherson J.A.'s conclusion that the matter of profits and their attribution was the subject of extensive evidence and examination at the trial and that there was no denial to the respondents of an adequate opportunity of presenting their case.

Election

It is arguable that any order, such as that made by the trial Judge, for payment of a sum determined by an account of BTA's and ETA's profits should be divided into two orders, one against BTA alone for the amount determined by reference to its profits and the other against ETA alone for the amount determined by reference to its profits. It is also arguable that any order for an account of equitable compensation for the loss sustained by Warman should have been made against Dwyer only. As has been mentioned, however, Dwyer, BTA and ETA did not argue in this Court or in the Court of Appeal that the respective orders made in the Courts below should not have been made against the three of them jointly. In the absence of any such argument, it has effectively been common ground that any orders made should be against all three. That being so, the question arises whether Warman should, at this stage, be given the opportunity to elect between an order for equitable compensation or an order for an account of profits or whether it has already made an election in favour of an account of profit if, as we have found, it is otherwise entitled to such an order.

The case has been argued in this Court on the footing that Warman seeks an account of profits in preference to the order for equitable compensation made by the Court of Appeal. The material before the Court would seem to indicate that the order for an account of profits which we have found Warman to be entitled to is a more favourable one from its point of view. In these circumstances, the appropriate course would seem to be to delay the making of final orders for seven days to give the appellants (Warman and Peko-Wallsend) the opportunity of seeking to retain the order for equitable compensation made by the Court of Appeal in preference to the order for an account of profits. If no such application is made within that period, the final orders providing for an account of profits should be made.

Conclusion

In the result and subject to what is said in the preceding paragraph, we would allow the appeal and set aside the orders made by the Court of Appeal. In lieu thereof, we would allow the appeal to that Court, set aside the orders made by the trial Judge other than the orders for costs and order that the matter be remitted to enable accounts to be taken of the profits made by the businesses conducted by BTA and ETA in their first two years of operation, which appear to be the two years commencing on 12 September 1988, that being the date on which the joint venture agreement between Bonfiglioli, BTA and the Dwyers

was executed. It will be for the trial Judge to determine the amount of interest accruing on the amount due, after making due allowance for the expenses, skill, expertise, efforts, capital and resources contributed by the respondents. That part of the amount found due on the taking of the account which relates to BTA's profits (together with interest thereon) should be secured by an equitable charge over the assets of BTA and that part of that amount which relates to ETA's profits (together with interest thereon) should be secured by an equitable charge over the assets of that company. The respondents should be ordered to pay the costs of the appellants in this Court. The orders for costs made in the Courts below should remain undisturbed. The costs of the taking of the accounts should be in the discretion of the Supreme Court.